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No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether petitioner's lobbying a private model code organization, whose code is adopted by numerous state and local legislatures, can be held an actionable restraint of trade under the Sherman Act, consistently with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and subsequent decisions further clarifying its doctrine.

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BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF THE AMICUS

The State of Illinois submits this brief, as *amicus curiae*, in support of Allied Tube & Conduit Corporation's ("Allied") contention that the *Noerr-Pennington* doctrine precludes antitrust liability for Allied's lobbying activities before the National Fire Protection Association ("NFPA").

The Attorney General of Illinois is the chief law enforcement officer of the state and is charged with the duty

of enforcing the state's antitrust laws, as well as the federal antitrust laws. Illinois has a substantial interest in the correct interpretation by the lower federal courts of this Court's antitrust doctrine.

The Second Circuit's opinion will adversely impact upon the method by which states such as Illinois promulgate legislation in the areas of product safety and building construction. The opinion will jeopardize the crucial, free flow of scientific and technical information into the model code making process. It will deprive the code process of significant data currently furnished by commercially motivated private parties and place a substantial burden upon state and local legislatures to provide the financial means and technical expertise necessary to develop safety codes on their own; a burden they may be incapable of meeting.

SUMMARY OF ARGUMENT

Illinois and many other states depend upon model codes such as the National Electrical Code ("NEC") at issue, in exercising their regulatory and police powers in the protection of the health, safety and welfare of their citizens. The Second Circuit decision jeopardizes the system of governmental reliance on model codes, by denying those concerned parties with the greatest opportunity and motivation for valuable input, and which historically have raised significant public safety issues before the code-making bodies, protection from treble damage liability under the Sherman Act. Substantial exposure to such liability will cause a withdrawal, in whole or in part, of these resources from the process, limiting the debate and diminishing the

quality of the model codes adopted by state and local governments.

This Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); commonly referred to as the *Noerr-Pennington* doctrine, held that the First Amendment rights to petition the government and to freely assemble, along with the absence of legislative intent in the Sherman Act to regulate political activity, dictated a finding that commercial competitors are free to jointly lobby the government for anticompetitive legislation without fear of antitrust liability.

The *Noerr* doctrine fully applies to the facts of this case. Allied's conduct in this case was in fact protected lobbying activity. The Second Circuit incorrectly decided the "directness" issue in failing to extend *Noerr* to lobbying before a private code making body which promulgates a code adopted by state governments. If the deceptive public relations campaign by the railroads in *Noerr*, entirely removed from the halls of Congress, is protected; surely the lobbying within the rules and regulations of the NFPA is protected.

Finally the "sham" exception to the *Noerr-Pennington* doctrine is not applicable. There was no denial of access to the process of the NFPA and no violation of the NFPA rules or regulations. Allied genuinely sought to petition the NFPA and consequently influence the state and local legislatures as an end or goal in and of itself, not as a facilitating device for a larger, separate scheme.

ARGUMENT

I.

ILLINOIS AND OTHER STATES SUBSTANTIALLY RELY ON MODEL CODES SUCH AS THE NEC

In technical and complex areas, as for example, safety codes and building regulations, state and local governments rely heavily upon a variety of model codes and other standards developed by voluntary organizations like the NFPA. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329 (1978).

Illinois requires compliance with the NEC in all cities, towns and communities except those which by ordinance have adopted comparable provisions. See, 41 Ill. Admin. Code, Part 100, Secs. 100.10, 100.210. Illinois has specifically delegated the power to establish building codes to local governmental units. See, Ill. Rev. Stat., ch. 24, par. 11-30-4 and ch. 34, par. 422. It is estimated that over fifty percent of all Illinois municipalities have adopted the NEC.

Forty-four other states, including the District of Columbia, rely on the NEC in promulgating their electrical codes. Aff. of John Lison, May 16, 1985, Joint Appendix, 137, 145 as submitted in the case below. Twenty-five states adopt the NEC in its entirety by reference. *Id. See, e.g.*, 1981 N.Y. Laws Chap. 707; Md. Ann. Code art. 38a, Sec. 60; Colo. Rev. Stat. Sec. 12-23-104(a). Another nineteen adopt it with amendments, usually modest ones. *Id. See, e.g.*, Cal. Admin. Code Tit. 24, R.3; 527 Code of Mass. Regs. 12.00; N.J. Admin. Code, Tit. 5, Sec. 23; Wash. Admin. Code R. 296-46, R. 296-401. *See also* 29 C.F.R. Sec.

1910.66(c)(22)(i) (1986); 33 C.F.R. Sec. 183.435(a)(1) (1986) (federal regulations incorporating model codes by reference).

The development and promulgation of such complex codes requires public hearings, which usually involve technical, scientific data and issues. Hearings are frequently time consuming, particularly when controversial matters may result in judicial challenges to adopted regulations. Furthermore, airing of the technical issues requires expert staff to conduct the hearings, analyze the evidence, weigh the sometimes conflicting data, prepare the appropriate code language and disseminate adequate information to those affected by the regulations in order to secure compliance.

As a practical matter most state and local governments lack the necessary resources to conduct their own investigations. For that reason and because the NFPA and other groups do a competent job in their own right, state legislatures depend on the NFPA and like code-making associations to become, in effect, their committees and scientific laboratories. *See* Hamilton, *supra*, at 1377-78.

These voluntary organizations perform an invaluable public service and save state and local governments precious legislative resources in developing model codes for government consideration. *See* House Select Comm. on Small Business, *The Effect Upon Small Business of Voluntary Industrial Standards*, H.R. Rep. No. 1981, 90th Cong. 2d Sess. 3, 75 (1968).

II.

THE SECOND CIRCUIT'S DECISION WILL CHILL THE DEBATE REQUIRED FOR AN EFFECTIVE MODEL CODE PROCESS

State and local governments are best served by code-making organizations, such as the NFPA, having access to a free and vigorous flow of information and conducting robust and aggressive debate in creating the model codes. The full exchange of ideas—even "wrong" ones—is the crucible which shapes the final legislative product as it emerges from the mode code-making group's processes. Often, a party in the best position to raise concerns about the safety of a product is a competitor. *See, e.g., Noerr*, 365 U.S. at 136-137. Challenges, such as those made by Allied against respondent's PVC conduit on safety grounds, are precisely the sort of catalyst for investigation upon which the code-making process, and in turn the states, depend.

The imposition of antitrust liability in the circumstances of this case will inhibit free and open debate within model code organizations by those parties most capable and motivated to bring all the facts to the fore. Allied raised the issue of the safety of PVC conduit before the NFPA. While clearly Allied was motivated in part by commercial interest, the jury found as a matter of fact that Allied was also motivated by a genuine concern for safety. Furthermore, the objective validity of the safety issue raised by Allied was conceded at the trial by respondent. If Allied's conduct is not protected, few will ever be safe. Parties simply will not risk antitrust litigation to oppose a competitor's product, even with strong arguments based upon bona fide, scientific evidence that a particular product is unsafe or otherwise hazardous.

The decision below thus goes to the very heart of model code-making and threatens to destroy the model code process. It will become a sham, with critics of a product afraid to speak up for fear of exposure to antitrust claims. Nor is it an answer that participants may move to the legislatures directly with their challenges. The legislatures are ill-equipped to assume the task of initiating and developing complex codes from scratch in technical areas without the assistance of model codes. Taking over these functions would require staff increases at a time when most budgets are under considerable pressure.

In addition to the practical difficulty of state governments conducting hearings or revising technical codes, the Second Circuit's opinion may bring other more far-reaching problems. As code-making breaks down, the relative uniformity of product safety legislation in the building area will tend to diminish. The result is likely to be unseemly and dangerous competition for building activity based upon how lax a code a local area is willing to accept in order to induce the work.

On the other hand, the additional burden of having to develop complex legislation without the benefit of prior code-making will tend to cause local governmental units to be more reticent about changing and updating codes to accommodate new products or necessary changes. Paradoxically, a Court of Appeals decision that ostensibly is intended to enhance competition may well do the exact opposite, in the long run perpetuating and entrenching existing products.

III.

THE SECOND CIRCUIT MISINTERPRETED THE PROPER BREADTH OF THE *NOERR-PENNINGTON* DOCTRINE

In *Noerr* and its progeny, this Court clearly held that the First Amendment rights of association and petition coupled with an absence of legislative intent in the Sherman Act to regulate essentially political activity, mandated the freedom of commercial competitors to jointly lobby the government for even anticompetitive legislation. See, *Noerr*, *Pennington* and *California Motor Transport Co.*, *supra*.

The central issue in this litigation is whether *Noerr* protection extends to lobbying activities before private model code-making organizations, whose codes such as the NEC are then adopted in whole or substantial part by state and local legislatures. The four federal courts having considered this issue, other than the Second Circuit, have all extended *Noerr* to shield such lobbying activities. See, *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458 (9th Cir. 1987), *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983), *Rush-Hampton Industries v. Home Ventilating Institute*, 419 F. Supp. 19 (M.D. Fla. 1976), and *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, No. 81 Civ. 6250 (S.D.N.Y. June 27, 1986) (Dist. Ct. opinion below).

In *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, *supra*, a case remarkably similar to this one, a company manufacturing fuel tank liners sued a company making fuel tanks, arguing that defendant Joor Manufacturing had undertaken a false information campaign to convince model code-making bodies to disallow tank liners.

The association in this case was the Western Fire Chiefs Association, WFCA, which passes a uniform fire code, just as the NFPA passes the NEC. Also at issue was the defendant's influence in persuading Underwriters Laboratories ("U.L."), another model code organization, not to certify the safety of tank liners.

The Ninth Circuit held:

> In the case before us, however, the defendant's efforts were directed at a private association serving as a conduit to local legislatures and various governmental agents. . .
>
> We hold that *Noerr-Pennington* applies. It immunizes proper lobbying—either singly or in combination with others—of a private association engaged in promulgating an important model code to influence legislative and executive decisions.
>
> Our holding rests on the various constitutional, policy and statutory considerations that underlie the *Noerr-Pennington* doctrine. Each of these considerations points clearly to the conclusion that *Noerr-Pennington* applies here.

at 827 F.2d 462.

Similarly, in *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983), Allied, the petitioner in this case, sued Wheeling-Pittsburgh over Wheeling-Pittsburgh's attempt to lobby the NFPA to disapprove in the NEC a new type of conduit produced by Allied. The Court correctly recognized two key points. First, it noted the delegation of authority from state governments to model code groups:

> Such wholehearted reliance upon the NFPA and UL by these governmental entities has resulted in a near complete delegation of governmental authority to these otherwise private entities. While the govern-

> mental bodies of course have retained the power to modify or reject the NFPA and UL recommendations, in practice they have relied completely on them.

Id. at 838.

Second, the Court recognized the consequent difficulty of petitioning state government directly:

> as a practical matter it would be virtually impossible for WP to lobby the individual municipalities and states regarding the adoption of particular specifications or requirements for IMC. These governmental bodies have placed total trust and reliance on NFPA and UL. In order to influence effectively the governmental entities, WP had no option but to lobby NFPA and UL.

Id. at 838. *See also Indian Head, Inc. v. Allied Tube & Conduit Corp.*, No. 81 Civ. 6250 (S.D.N.Y. June 27, 1986) (Dist. Ct. Opinion below); *Rush Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19 (M.D. Fla. 1976).

The State of Illinois urges the Court to accept the teaching of these four opinions not merely on a "strength in numbers" basis; but upon the logic of so extending the doctrine as already accepted by this Court in *Noerr* itself. The conduct involved in the instant case is more directly connected to the legislative chambers than that involved in *Noerr*. In *Noerr*, this Court placed out of Sherman Act reach, a joint public relations campaign by competitors involving the use of the so-called third party technique, whereby propoganda actually circulated by a party in interest is given the appearance of being the spontaneously expressed views of impartial citizens and civic groups. While the ultimate goal may have been to lobby the government the means were more indirect then "packing" the NFPA vote.

Similarly, the identity of the lobbyist and propriety of the methods employed cannot be the crucial factors in deciding the *Noerr* question. It is well established that neither the commercial motivation, no matter how anticompetitive, nor the methods employed, no matter how distasteful or even unethical (including outright misrepresentation) determine the issue. See, *Noerr*, supra; P. Areeda & D. Turner, *Antitrust Law*, Sec. 204.1c, at 45-46 (Supp. 1986); and *Sessions Tank Liners, Inc.*, supra, at 827 F.2d 467-468 (cases cited therein).

Clearly, Allied's conduct is protected from antitrust exposure under the *Noerr-Pennington* doctrine.

IV.

NOERR-PENNINGTON'S "SHAM" EXCEPTION DOES NOT APPLY

The jury finding that Allied "subverted" the NFPA code-making process through its "packing" the vote, heavily influenced the Second Circuit's denial of *Noerr* protection. While it did not then have to reach the sham exception issue, undoubtedly respondent will raise this issue as it did in the courts below.

The sham exception will virtually never apply in legislative petitioning cases. The State of Illinois is not aware of a single legislative petitioning case wherein the challenged conduct has been found to be a sham. See, Handler & DeSovo, *The Noerr Doctrine and Its Sham Exception*, 6 Cardozo L. Rev. 1 (1984).

Allied violated no rule or regulation of the NFPA, no misrepresentations appear of record, no attempt was made at denying respondent access to the code-making process, and the purpose of excluding PVC from the NEC was the ultimate goal as opposed to a subterfuge or facilitating

device for a larger scheme. The record establishes that Allied had a genuine belief that the PVC product was unsafe and it acted, at least, in part on that belief. Neither court below found Allied's conduct to be a sham. The "subversion" finding does not provide a basis for application of the sham exception any more than did the railroads' unethical behavior, embracing "vicious, corrupt, and fraudulent" conduct in *Noerr*. 365 U.S. at 129. See also *Sessions, supra*. 827 F.2d at 468.

CONCLUSION

For all of the reasons stated herein, the State of Illinois respectfully requests that the decision of the Second Circuit Court of Appeals be reversed.

Respectfully submitted,

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